

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7 HOLLAND & KNIGHT & RICHARD  
PRICE,  
8 Plaintiff,  
9 vs.  
10 ALAN DEATLEY,  
11 Defendant.  
12 } No. CV-06-278-JLQ  
13 } ORDER ON DEFENDANT'S  
MOTION TO VACATE STATUS  
CONFERENCE & ORDER TO  
FILE AS TO FRIVOLOUS  
APPEAL

14 The Defendant's Motion To Vacate Status Conference previously set by this court  
15 for August 30, 2007 is based upon a statement by attorney Leslie Powers that "he will  
16 be sailing" at that time. Mr. Powers has not furnished the court with other suggested  
17 dates for the Status Conference. Therefore, the court strikes the August 20, 2007 Status  
18 Conference date and resets the Status Conference for telephonic hearing for Monday,  
19 September 17, 2007 at 3 p.m. Because of this court's well-founded beliefs that the  
20 Defendant and his counsel have attempted (successfully so far) to delay these matters,  
21 the court will not entertain any further request for continuance of the Status Conference.

22 Counsel for the Defendant further suggests that this court may no longer entertain  
23 dispositive motions, etc. by reason of the Defendant's appeal to the Ninth Circuit Court  
24 of Appeals. However, this court's Order Denying Motions To Dismiss are not final  
25 Orders and it appears the Notice of Appeal filed by the Defendant is nothing more than  
26 another attempt to delay this matter. While as a general rule, the filing of a notice of  
27 appeal divests a district court of jurisdiction over those aspects of the case involved in

1 the appeal, *Stein v. Wood*, 127 F. 3d 1187, 1189 (9<sup>th</sup> Cir. 1997), the denial of a motion  
2 to dismiss based on lack of jurisdiction is not immediately appealable. *Kwai Fung Wong*  
3 *v. United States INS*, 373 F. 3d 952,960 (9<sup>th</sup> Cir. 2004). This court’s Order Denying  
4 Motion To Dismiss was not a “final decision” that may be appealed pursuant to 28  
5 U.S.C. § 1291. A “final decision” for purposes of § 1291 is a “decision by the District  
6 Court that ends the litigation on the merits and leaves nothing for the court to do but  
7 execute the judgment.” *Duke Energy v. Davis, et al*, 267 F. 3d 1042, 1048 (9<sup>th</sup> Cir.  
8 2001)(quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)).

The Ninth Circuit has long recognized an exception to the rule that a Notice of Appeal divests the District Court of jurisdiction over those portions of the case to which the appeal is addressed. A frivolous or forfeited appeal does not divest the district court of jurisdiction. *Marks v. Clarke*, 102 F. 3d 1012, 1017 n.8 (1996), citing *Chuman v. Wright* 960 F. 2d 10105 (9<sup>th</sup> Cir. 1992). The district court may certify a frivolous appeal as being “wholly without merit,” which the appeal in this matter is since there is clear diversity of citizenship jurisdiction. The Defendant has never denied that he is a citizen of Colorado and neither Plaintiff in the two consolidated actions are residents of that state. While this court’s prior Order directing the filing of Answers remains in place and the court will proceed with the September 17, 2007 Status Conference, on or before September 10, 2007, each party shall file and serve a brief of not more than ten pages as to whether this court should certify the Defendant’s Notice of Appeal as being frivolous.

21 The Clerk of this court shall enter this Order and forward copies to counsel.

22 || DATED this 15th day of August 2007.

23 s/ Justin L. Quackenbush  
24 JUSTIN L. QUACKENBUSH  
SENIOR UNITED STATES DISTRICT JUDGE